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Supreme Court, U.S.
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No. 03-1545

IN THE

Supreme Court of the United States

STEPHEN WOLK AND HELEN J. WOLK, PETITIONERS

v.

ORANGE COUNTY, FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KEVIN KNIGHT
FLA. BAR NO. 318892
Counsel of Record
DEBEAUBIEN, KNIGHT, SIMMONS,
MANTZARIS & NEAL LLP
P.O. BOX 87
332 N. MAGNOLIA AVENUE (32801)
ORLANDO, FL 32802
(407) 422-2454
FAX NO.: (407) 422-0970
KKNIGHT@DBKSMN.COM
Attorneys for Respondents

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

The CEB Defendants disagree with the questions presented for review and would submit the following:

1. Whether sections 162.07 and 162.09 of the Florida Statutes, and sections 11-35 and 11-37 of the Orange County Code (collectively referred to as "the provisions") provide for sufficient due process to alleged code violators such that these provisions are constitutional where they provide for a pre-deprivation notice and an evidentiary hearing and require an affidavit from a county code inspector regarding noncompliance before any lien is placed against a property owner's property.

2. Whether the District Court properly determined that the CEB related Defendants were entitled to qualified immunity based on the allegations of the complaint as such allegations attempt to set forth a § 1983 action.

LIST OF ALL PARTIES IN LOWER COURT

A list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed herein, listed alphabetically, is as follows:

Terry W. Boston;
Beverly M. Boyer;
Mark A. Chernega;
George L. Dorsett;
State of Florida (as amicus curiae);
Edward J. Fox, Jr.;
Edward A. Freak;
Joel D. Hammock;
Ronald Hill;
W. Robert Humble;
Mary Kaschai;
Daniel F. Martzaris;
Orange County, Florida;
Orange County, Florida Code Enforcement Board;
Joseph Perkins;
Melvin Pittman;
Jim Powers;
Marlene Reilly (as Personal Representative of the
Estate of Joseph James Reilly);
W. Steven Rodgers;
Helen J. Wolk;
Stephen Wolk;
Jimmy Wrye; and
Fran H. Wyatt.

A corporate disclosure statement is not required

pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States[1] because there is no petitioner herein that is a nongovernmental corporation.

[1] All references to rules in this petition are to the Rules of the Supreme Court of the United States, and therefore will be made hereinafter by reference to the number of the rule only, e.g., "Rule 29.6".

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NOT SUBJECT TO SIGNIFICANT POTENTIAL ERRORS; AND (D) THE WOLKS' ACTIONS DEMONSTRATE THAT THEY AVAILED THEMSELVES OF SEVERAL POST DEPRIVATION OPPORTUNITIES TO HAVE THE LIEN REMOVED OR REDUCED.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Brief In Opposition is submitted by Respondents, W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran H. Wyatt, W. Steven Rodgers, Jim Powers, Beverly M. Boyer, Joel D. Hammock, Mark A. Chernega, Daniel F. Mantzaris and Drage, deBeaubien, Knight, Simmons, Mantzaris & Neal, P.A., n/k/a deBeaubien, Knight, Simmons, Mantzaris & Neal LLP. With the exception of Mr. Mantzaris and the Drage Law Firm, all of these Respondents were past or are present members of the Orange County Code Enforcement Board ("CEB"); Mr. Mantzaris was, and is, the acting attorney for the CEB and a partner in the Drage Law Firm. During the course of this Opposition Brief, these Respondents will be collectively referred to as the CEB Defendants.

Respondents request that this Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on November 18, 2003.

INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Middle District of Florida dismissing the Wolks' Amended Complaint on the basis that appropriate procedural due process was afforded to the Wolks under the standards enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). With regard to the CEB Defendants, the District Court also

determined that the cause of action should be dismissed against them even if the ordinance and state were unconstitutional because they were entitled to qualified immunity. (District Court Opinion Pages 34 and 39).

In considering the issue of whether another notice and hearing should be added prior to the imposition of a lien, the District Court found that "[t]he risk of an erroneous imposition of a fine/lien under the code enforcement scheme is extremely low" because the property owner is:

> "afforded an opportunity to contest the alleged violations at a hearing and the violations having been found as a fact by the board, the act of the code inspector in rechecking the property for compliance is merely ministerial-the violations either have or have not been remedied." See Page 20 of District Court decision.

In addition, the District Court noted that additional hearings (as proposed by the Wolks prior to the imposition of a lien) would be "unnecessary and even unworkable." (District Court Decision Page 21). This is especially the case because the applicable ordinance and statute do not preclude the property owner from submitting documentary evidence regarding compliance either pre- or post-deprivation.

The Wolks try to stir the procedural due process pot by asserting that the only opportunity that a property owner has for demonstrating compliance with the applicable building codes is at the initial evidentiary hearing on the original citation. This position, however,

was not joined by the District Court or the U.S. Court of Appeals for the Eleventh Circuit; indeed, the District Court noted that a property owner was not precluded from bringing forth evidence of compliance either pre or post deprivation. In fact, the Wolks filed several post deprivation motions with the Code Enforcement Board and with the Circuit Court and were successful in reducing the fine from $182,000 to $10,000.

The type of grievances voiced by the Wolks are really no different than those voiced, and resolved in favor of the governmental entity, in the Court's recent decision in *City of Los Angeles v. David*, 538 U.S. 715 (2003). In the *City of Los Angeles* case, the Court found that due process was not compromised by Los Angeles' thirty day delay in holding a hearing after a vehicle had been towed. This holding was premised on the fact that the vehicle towing process was "unlikely to spawn significant factual errors" and that the "straightforward nature of the issue—whether the car was illegally parked—indicates that initial towing errors, while they may occur, are unlikely."*Id.* at 718. This is similar to the finding made by the District Court in the case at bar, to wit: the act of determining whether electrical code violations were corrected on the Wolks' property was "ministerial" in nature.

The due process afforded the WOLKS under the Orange County, Florida Code Enforce Ordinances is significantly greater than that set forth in the *City of Los Angeles* case. Unlike the vehicle owners in the *City of Los Angeles'* case, the Wolks had an evidentiary hearing BEFORE any lien was imposed or deprivation suffered. Even if the Court were to determine that Chapter 162 was unconstitutional, the claims against

the CEB Related Defendants were properly dismissed because these defendants enjoyed qualified immunity.

The WOLKS' Petition For Writ of Certiorari raises no conflict between the United States Circuit Courts of Appeal, with any United States Supreme Court case or with any decision of the Florida state courts. Further, the salient issues were recently addressed in the *City of Los Angeles* case and in the decisions cited therein.

STATEMENT OF THE CASE

The CEB Defendants do not accept Petitioners-Wolks' Statement of the Case because it contains substantial irrelevant information not germane to the disposition of the Petition. Thus, the CEB Defendants offer the following Statement of the Case:

A. BASIS OF THE FINES ASSESSED AGAINST THE WOLKS

This case arises from the imposition of fines by the CEB for electrical code violations on the Wolks' rental property; the authority for such fines is found in *Fla. Stat.* Chapter 162 and Orange County Code Section 11-37[1].

STATUTORY BASIS FOR THE CEB'S ACTIONS:

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[1] Since the key Orange County Code provisions mirror *Fla. Stat.* Chapter 162 provisions, references in this Brief to Chapter 162 will collectively refer to both provisions.

The Wolks' Amended Complaint did not assert that the CEB related defendants failed to follow the step by step procedures of *Fla. Stat.* Chapter 162 and the applicable Orange County Code provision; rather, the Wolks essentially argued that the provisions did not adequately comport with due process requirements.

The procedures under *Fla. Stat.* Chapter 162, are as follows:

1. A code inspector initiates enforcement procedures under *Fla. Stat.* Section 162.06(1).

2. When a violation is found, the code inspector notifies the violator and gives him or her a reasonable time to correct the violation. *Fla. Stat.* Section 162.06(2).

3. If the violation continues after the reasonable time, the code inspector notifies the CEB. *Fla. Stat.* Section 162.06(2).

4. The CEB then conducts a hearing. *Fla. Stat.* Section 162.06(2).

5. At the hearing, the CEB hears testimony under oath from the Code Inspector and the violator without applying the "[f]ormal rules of evidence" and observing "fundamental due process." *Fla. Stat.* Section 162.07(3).

6. When the hearing concludes, the CEB issues findings of fact, conclusions of law and an Order

affording the "proper relief consistent with powers granted herein." *Fla. Stat.* Section 162.07(4)(emphasis added).

7. The CEB's Order "may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under the conditions specified in s. 162.09(1), the cost of repairs may be included along with the fine if the order is not complied with by said date." *Fla. Stat.* Section 162.07(4). Further, "[a] certified copy of such order may be recorded in the public records." *Id.* If compliance is achieved, the CEB "shall" issue an order acknowledging compliance which "shall" be recorded in the public records. *Id.*

8. If the Code Inspector notifies the CEB that timely compliance has not occurred or that there is a repeat violation, the CEB may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set for compliance or for each date the repeat violation continues using the "date the repeat violation is found to have occurred by the code inspector." *Fla. Stat.* Section 162.09(1). The fine (at the time this matter occurred) could not exceed $250 per day unless it is a repeat violation; in such an instance the fine could not exceed $500 per day. *Fla. Stat.* Section 162.09(2).

9. The CEB may reduce a fine and may record a certified copy of the Order imposing a fine on the public records. *Fla. Stat.* Sections 162.09(2)(c) and (3).

10. Prior to Orange County being entitled to take ANY action to foreclose the lien, the County must seek authorization from the CEB. *Fla. Stat.* Section

162.09(3).

KEY FACTS:

The WOLKS' rental property was cited for electrical code violations on August 9, 1996, by Orange County, Florida code inspectors; correction of the violations were required to be made by August 26, 1996.

After an inspection and a code inspector determination that the violations were not corrected, the code inspector requested a hearing before the Orange County Code Enforcement Board. The Wolks were notified of the evidentiary hearing, appeared and presented their evidence on November 20, 1996.

The Board entered a Compliance Order which provided:

(1) the violations noted in the statement of violation existed and had to be corrected by December 4, 1996.
(2) failure to timely cure the violations would result in the imposition of a $250 per day fine for each day after December 4 that the violations remained uncorrected.
(3) The Wolks were directed to contact the inspector asserting the violation to arrange for a compliance inspection once the remedial work was completed.
(4) The CEB determined that the electrical code violation presented a "serious threat to the public health, safety, and welfare"; consequently, a copy of the order was being sent to Orange

County.

The Wolks did not seek any review of the Board's Order although such was authorized under the Orange County, Florida Code. A code inspector issued an Affidavit of Non-Compliance on February 7, 1997, which resulted in the Orange County Code Enforcement Board issuing an Order "Imposing Administrative Fine/Lien on March 19, 1997. This Order fined the Wolks $250 per day for each day of noncompliance after December 4, 1996.

On April 16, 1997, the Wolks filed a Motion To Vacate the Fine Order as being fraudulently procured; this Motion was presented to the Orange County, Florida Code Enforcement Board which refused to hear the matter because it had no express statutory authority to hear such a motion.

On June 22, 1998, the Wolks requested that Orange County inspect their property and this inspection resulted in an Affidavit of Compliance being submitted to the Orange County, Florida Code Enforcement Board on December 3, 1998. The fine against the Wolks' property was computed to be $182,000 for which the Wolks filed a Motion To Reduce with the Board.

At a hearing on January 20, 1999, the Board entered an Order reducing the fine from $182,000 to $100,000. Still not satisfied with the amount of the reduction, the Wolks moved to vacate the Fine Order and the Fine Reduction Order as being void and inconsistent with due process. This matter was heard before the Board on March 15 and April 19, 2000. The

Board denied the Wolks' motion to vacate.

The Wolks filed suit in Orange County, Florida Circuit Court appealing the Fine Reduction Order. By Order dated January 8, 2001, the Circuit Court found the $100,000 fine to be excessive and it was later reduced to $10,000.00.

REASONS FOR DENYING THE PETITION CONTRARY TO PETITIONER'S ASSERTION, THE SUBJECT DECISION HOLDING SECTIONS 162.07 AND 162.09, FLA. STAT. (SECTIONS 11-35 AND 11-37, ORANGE COUNTY CODE) CONSTITUTIONAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT ON PROCEDURAL DUE PROCESS, NOR WITH THE FLORIDA APPELLATE COURT OF LAST RESORT, BECAUSE: (A) A PROPERTY OWNER IS AFFORDED REASONABLE DUE PROCESS PRIOR TO THE IMPOSITION OF ANY LIEN INCLUDING NOTICE AND AN EVIDENTIARY HEARING ON THE INITIAL DETERMINATION OF WHETHER A CODE VIOLATION HAS OCCURRED; (B) A LIEN IS IMPOSED ONLY AFTER A CODE INSPECTOR FILES AN AFFIDAVIT OF NONCOMPLIANCE:
(C) THE CODE INSPECTOR'S DETERMINATION OF COMPLIANCE IS A MINISTERIAL FUNCTION NOT SUBJECT TO SIGNIFICANT

POTENTIAL ERRORS; AND (D) THE WOLKS' ACTIONS DEMONSTRATE THAT THEY AVAILED THEMSELVES OF SEVERAL POST DEPRIVATION OPPORTUNITIES TO HAVE THE LIEN REMOVED OR REDUCED

I. The Decision Below Does Not Conflict With Any United States Supreme Court Decision or Decision of a United States Court of Appeals.

The decisions by the United States Court of Appeals for the Eleventh Circuit and the United States Middle District in this case do not conflict with any decision of the Court or the United States Court of Appeals. Indeed, the Court has very recently addressed the issues raised by the Wolks in the *City of Los Angeles* case and the decision fully supports the rulings in the case below.

The facts in the subject case emphasize that the Wolks had several pre and post deprivation opportunities to contest the lien and its amount and availed themselves of these opportunities.[2]

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court set forth the procedural due process requirements:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be

[2] With the lien being ultimately reduced from $182,000 to $10,000.

> affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

The *Mathews* analysis is fluid; it takes into account the "situational" perspective of the intent behind the statute, the rights being affected and the application of the statute setting forth the steps to be followed. Obviously the key consideration and objective in reviewing each of the *Mathews* elements is to strike the proper balance.

In applying the *Mathews* balancing test, the Court examines the degree of the potential deprivation and the length of the deprivation. *Mathews*, 424 U.S. at 340-41. In the present case, the Wolks did not lose all property rights related to their property; they suffered a temporary, partial encumbrance against their property, which **could** be removed once the violations are corrected. This is consistent with *Connecticut v. Doehr*, 501 U.S. 1 (1991) in which an attachment (somewhat similar to the subject deprivation) was distinguished from a complete or permanent deprivation as with a loss of household goods or wages. *Id.* at 12. Further, as noted in the District Court opinion in this case, such a deprivation is to a large extent within the control of the property owner. In such an

instance, something less than an evidentiary hearing is sufficient prior to administrative action.

Pursuant to Orange County, Fla. Code Section 9-14, the violator has the right to seek review of the code inspector's decision to the Building Codes Board of Adjustments and Appeals:

> The board [Building Codes Board of Adjustments and Appeals] shall have the following powers and duties subject to the procedures as may be set forth in this chapter, article II of chapter 18:
>
> > **(1) To hear any appeals from a decision of the building official as to the application or interpretation of a technical code pursuant to section 9-21 of the Orange County Code;**

Due to the large number of avenues available to an alleged violator, to provide any more hearings would be unduly burdensome; the determination of whether a code violation has been remedied is perfunctory or ministerial in nature. Such compliance or lack of compliance is straightforward; even if there is some error or question, the property owner has the right of appeal and the right to file a motion (as was done by the Wolks).

The third element of the *Mathews* test involving

the government's interest clearly supports the CEB related Defendants' actions, especially in light of the intent expressed in *Fla. Stat.* Section 162.02:

> It is the intent of this part to promote, protect, and improve the **health, safety,** and welfare of the citizens . . . by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide an **equitable, expeditious, effective and inexpensive method** of enforcing any codes and ordinances in force . . . where a pending or **repeated** violation continues to exist. (emphasis added).

In the present case, the Wolks' violations were electrical code violations in an apartment complex, a potentially serious safety hazard (i.e., fire, electrocution, etc.); this was not a case where the Wolks' property was deemed unsightly or that there was a non-authorized use of the property. If a violator was given the opportunity to have a hearing before the CEB on each decision made by either the code inspector or the CEB, then the process would be slow, ineffective, time consuming and expensive to all parties. This approach would further be inconsistent with the intent of the statute to "promote, protect and improve the health, safety and welfare of the citizens."

In addition to all of the previously referenced avenues of appeal afforded to the Wolks, the Wolks also had the option of appealing the CEB's initial November 20, 1996 Order to the Circuit Court as set forth *Fla.*

Stat. Section 162.11:

> An aggrieved party . . . may appeal a **final** administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed. (emphasis added).

Certainly, a person cannot be deprived of a property interest without some kind of notice and afforded some kind of hearing. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). In the case below, the Wolks had notice and an evidentiary hearing at the outset when they were first cited for electrical code violations and were advised that failure to timely correct the citations would result in a lien being imposed against their property.

According to the Wolks, however, this due process is not enough. They assert that property owners should have yet another hearing on the ministerial determination of whether the citations have been corrected. On balance, such a request is excessive because it would in effect double the volume of cases to be heard by the Orange County Code Enforcement Board. This point has not been lost on the Court before, as is seen in the *City of Los Angeles* case:

> The third Eldridge factor—the "Government's interest" argues strongly in the city's favor. The nature of the city's

> interest in delay is one of administrative necessity. The city points out that it "conducts more than a thousand vehicle impound hearings annually." Pet. For Cert. 8. It holds about five percent of these hearings-those involving individuals who are unable to afford the impoundment fees-within 48 hours. Ibid. It "takes time to organize hearings: there are only so many courtrooms and presiding officials; the city has to contact the towing officer and arrange for his appearance; the city may have to find a substitute to cover that officer's responsibilities while he attends the hearing." 538 U.S. at 718.

The subject case is factually distinguishable from the case of *County of Pasco v. Riehl*, 635 So.2d 17 (Fla. 1994). In the *Riehl* decision, the Florida Supreme Court determined that an ordinance which allowed a dog to be determined to be a dangerous animal upon an affidavit from a citizen that the dog was dangerous was unconstitutional because it did not provide for notice and a hearing prior to deprivation. Under the applicable ordinance, impoundment of the animal could be made on the affidavit of a citizen attesting to the fact that the animal was dangerous. This is decidedly different from the case below where a property owner is afforded notice and an evidentiary hearing on any alleged code violation and the lien is imposed only after an affidavit from a county code inspector.

Similarly, the case of *Massey v. Charlotte County*, 842 So.2d 142 (Fla. 2d DCA 2003) is

distinguishable. In the *Massey* case, Florida's Second District Court of Appeal determined that *Fla. Stat.* Chapter 162 should provide "some type of procedure" after entry of an order finding a code violation to determine whether the alleged violation continued, how long it continued, and whether there was any reason to reduce the per diem fine imposed in light of attempts by the [property owner] to comply." *Id.* at 147.

As previously noted, Orange County, Florida's Ordinances provide a remedy for a property owner to appeal a decision by a building official, such as a code enforcement inspector (Orange County, Fla. Ordinance No. 9-14). This Ordinance provides the relief that the *Massey* Court suggested should be in place under *Fla. Stat.* Chapter 162 to remedy the risk of improper seizure and due process violations.

It is wholly apparent that the decision in the case below is consistent with *Mathews*, *Doehr* and the *City of Los Angeles'* decisions and factually distinguishable from the *Riehl* decision. Thus, there is no basis for conflict certiorari.

II. Even If Chapter 162 Was Determined To Be Unconstitutional, the CEB Defendants Would Still Be Entitled to Qualified Immunity.

In its Order Granting the Defendants' Motion To Dismiss the Wolks' Amended Complaint, the United States District Court for the Middle District of Florida determined that the CEB Defendants were entitled to qualified immunity. (District Court Decision Pages 34 and 39).

As to the Orange County, Florida Code Enforcement Board members, this ruling is consistent with *Saucier v. Katz*, 533 U.S. 194 (2001) because it would not be "clear... 'that his conduct was unlawful in the situation he confronted.' (District Court Decision Page 34 *citing Saucier*, 533 U.S. at 202.

As to the CEB's attorney and his law firm, giving legal advice to a client-even if that client is a state actor-does not constitute action 'under color of law' as required for a Section 1983 cause of action. (District Court Decision Page 39).

Thus, there is no basis for a Petition For Certiorari where even if there was some indication that the statute or ordinance was unconstitutional, the Court had yet another compelling reason to dismiss the Complaint.

CONCLUSION

The orders of the Court of Appeals and the District Court are fully consistent with the United States Supreme Court decisions and the decisions of the United States Courts of Appeal on the due process issues. Further, the decisions do not conflict with the decisions of the Florida Supreme Court in the *Riehl* case or the Second District Court of Appeal for the State of Florida in the *Massey* case.

Even if Chapter 162 was determined to be unconstitutional, the Wolk decision was appropriate as to the CEB Defendants because they were entitled to qualified immunity.

The CEB Defendants respectfully request this Court issue an order denying the Wolks' Petition For Writ of Certiorari.

DATED: June 14, 2004

Respectfully submitted,

Kevin Knight
Fla. Bar No. 318892
DeBeaubien, Knight,Simmons,
Mantzaris & Neal LLP
P.O. Box 87
332 N. Magnolia Avenue (32801)
Orlando, FL 32802
(407) 422-2454
Fax No.: (407) 422-0970
Kknight@dbksmn.com
Counsel For CEB Respondents